No. 1168

UNITED STATES
CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT.

No. 10,878

ALBERT COVINGTON DULANEY, APPELLANT,

versus

M. COPPARD, TRUSTEE IN BANKRUPTCY, ETC., APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION.

Brief for Appellant.

ALBERT COVINGTON DULANEY,
Appellant.

LODOVIC PRINTING CO., SAN ANTONIO, TEXAS

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BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Appellant by this Appeal raises the question of the validity of an alleged order of the referee of December 9, 1942, attempting to give 90 days more time for filing objections to discharge in bankruptcy proceedings herein. At the first meeting of creditors held September 29, 1942, the referee in open court announced that December 10,

1942 was fixed as a date within which such objections could be filed, thus giving 73 days for such objections, the question of the validity of such extension order being raised by a motion to set aside such order made promptly after the pretended order was discovered. A firm of creditors of Dallas, Texas sent in by mail an unverified motion for an extension of time without making any request of the trustee to ask for such extension, the trustee never having asked for same, the creditor firm never having participated in any examinations of the bankrupt, having filed their claim after the first creditors' meeting, and not participating otherwise in any of the proceedings, no notice being given appellant, no hearing—not even by the makers of the motion, no evidence—not even an affidavit—no argument or chance to present the facts and law by any body, signing and whole proceeding in secret like the Court of Star Chamber, referee and trustee as provided by Federal Statutes being entitled to commissions on assets held to belong to bankrupt, plus perhaps a small deposit fee made when petition was filed, so that each was financially interested in holding the assets to belong to bankrupt though handled for years for others as the property of such others, referee overruling motion to set aside pretended order, which upon petition for review was upheld by the District Court, referee being appointee of such court.

SPECIFICATION OF ERRORS.

Specification 1. Pretended void order being based on motion merely of creditors, such order is a nullity because creditors are not legally qualified under the law to make the motion for the extension of time, without first requesting the trustee so to do.

Specification 2. Such creditors are not legally qualified to make the motion for the extension of time since they

have taken no part in the bankruptcy proceedings except to file their alleged claim, thereby being guilty of laches, having slumbered on their rights by not taking part in any examination, and therefore not entitled to have a useless, void order to be entered because of their neglect of participation and examination of bankrupt.

Specification 3. The pretended order is void, unconstitutional, and not due process of law because there was no notice to anyone, vital rights of owners of assets handled for them by bankrupt being affected materially and greatly because of a long drawn out examination of bankrupt for the purpose of wearing out those whose property was being handled by bankrupt as trustee and attorney, so to get commissions.

Specification 4. The pretended order is void and contrary to due process of law because there was no hearing of the motion given to anyone—not even to the creditors themselves.

Specification 5. The alleged order is void, unconstitutional, not due process of law, and not even a judicial act because same was not based on any evidence—not even an affidavit, being a secret proceeding, like in the Court of Star Chamber—the proceedings in which court even in memory have raised a stench in the nostrils of Anglo-Saxon freemen.

Specification 6. The alleged order is void, unconstitutional, not due process of law, and not even a judicial act because there was no argument, or chance to present the facts and the law by any body.

Specification 7. The alleged order is void, unconstitutional, not due process of law, and not even a judicial act because the signing of the order was in secret.

Specification 8. The alleged order is void, unconstitutional, not due process of law, and not even a judicial act because the referee who passed on the validity of the order December 9, 1942, after motion had been made to set aside such void order, could get pay for his work only by holding the assets of others handled for many years by bankrupt as trustee and attorney to be the individual property of bankrupt so said referee would thereby receive commissions provided by law on such assets, except for a small deposit of $15 to the referee, referee being thereby disqualified to pass on the validity of said void order, and no objections for discharge being filed within 73 days given by valid order, bankrupt is entitled to his discharge under the provisions of the Federal Statutes.

The record in this appeal is made up of an agreed statement of the case under Federal Rule 76 set out in Transcript of Record, beginning on page 2 thereof in which agreed statement it is shown that on September 16, 1942, the voluntary petition of bankrupt was filed in the United States District Court for the Western District of Texas, San Antonio Division, adjudication being entered September 17, 1942, the first meeting of creditors being held September 29, 1942 where in open court the referee fixed December 10, 1942 as a time for filing objections for discharge, entering a written order to that effect, of which notice by mail was given to all parties in interest. November 20, 1942, a subpoena duces tecum was issued requiring the bankrupt to produce at a hearing before the referee three days later, under Section 21-a of the Bankrupt Act, all books of account, records and documents showing his individual, personal financial condition, as ATTORNEY and trustee and otherwise, thereby seeking to force bankrupt to disclose privileged matters which as attorney he had no right to disclose.

Page 3 of the Transcript shows it was agreed that December 9, 1942, Biggers, Baker and Lloyd of Dallas, Texas, whose claim as creditors had theretofore been filed and entered, sent by mail to the referee, an unverified application requesting that further time be extended creditors to file objections to discharge, the trustee not being a party to such application, said creditors having taken no prior active part, nor having appeared in the proceedings. No notice of the filing of this application was given the bankrupt, and on the same date that this application was received by the referee, without any opportunity to be heard, the referee filed an alleged order seeking to extend the time for filing objections to discharge to March 10, 1943, the effort being made by the creditors, the trustee and his attorney and the referee by secret proceedings, attempting to approve a long drawn out examination, notwithstanding as shown on page 30 of the Transcript that the personal affairs of the bankrupt were very simple, no books being kept separately, but by separate columns showing in the books of the trust estate being handled by bankrupt for clients, what was due at any time to the personal account of the bankrupt, the whole purpose of the extension being to wear out those whose assets were tied up for as long a time as possible, thereby hoping for some compromise so that property belonging to others could, regardless of law and evidence, be held to belong to bankrupt so commissions could be realized thereon. The original 73 days allowed more than enough time for going over the simple affairs of the bankrupt, the Transcript on page 3 showing that no objections to bankrupt's discharge had been filed, and also that since March 10, 1943, notice has been given to the bankrupt and an opportunity to be heard has been given, as re-extensions of time for filing objections to discharge have been approved by the referee on application of the trustee—not

a creditor, thereby admitting that the pretended order of December 9, 1942 was void.

January 28, 1943 bankrupt filed with the referee a motion to set aside as void the order of December 9, 1942 extending time for filing objections to discharge, it being the earliest time possible to file such motion on account of the secret proceedings, the alleged order being discovered some time after it was filed by the referee.

February 25, 1943 the referee heard the motion to set aside the void order, and overruled the motion by order entered February 26, 1943. Petition for review was properly taken to the District Court where the District Judge upheld his appointee, the referee.

This appeal has been duly and properly taken in this Court so the question of the validity of the alleged order of December 9, 1942 may be passed on by this Court. Collier on Bankruptcy seems to be considered as a "Bankruptcy Bible" in the office of the referee. It is perhaps the best authority on the subject. Collier on Bankruptcy, 14th Edition, Volume II, page 1594, properly states the principle upheld by the Federal Courts as to referee's orders, being stated as follows: "REASONABLE NOTICE AND A RIGHT TO BE HEARD ARE A REQUISITE TO THE VALIDITY OF ANY ORDER ISSUED BY THE REFEREE". Courts have held that where a litigant's attorney seeks to take a non suit or having case dismissed without prejudice, since any plaintiff as a matter of right may do this if done in proper time, no notice would be required where the defendant on the other side, even if heard, would not be entitled to prevent a non suit being taken. The rule is, however, entirely different as to the orders of the referee. The policy of the bankruptcy law is for a speedy winding up of the affairs of the bankrupt, no long drawn out proceedings being rightfully permitted for the

purpose of wearing out people whose funds were handled by bankrupt, and where the books clearly show that at the time the petition was filed, the bankrupt had no personal financial interest in any of these assets. A REASONABLE NOTICE AND OPPORTUNITY TO BE HEARD ARE ESSENTIAL TO THE VALIDITY OF ANY ORDER OF THE REFEREE. Trustee's Reply Brief in the trial court admits this as correct because no mention is made of it, Tr. pp. 7-17, appellant moving said trial court to strike Reply Brief and grant discharge to appellant, Tr. pp. 18-21, no written response being made to Reply Brief, thereby admitting Appellant's contention to be correct.

In 42nd Corpus Juris, page 480, necessity for notice and hearing in the matter of motions is set out in the following language: "Where the principles of natural justice demand that rights be not affected without an opportunity to be heard, notice of motion will be required, notwithstanding the silence of the statute as to notice of the motion in question* * *. If the granting of a motion is mandatory and does not rest in the discretion of the Court, it may ordinarily be made without notice, whereas notice is necessary if the motion is not grantable of course".

In the case of proceedings before the referee, where the bankrupt has been handling the assets belonging to others whose lives will be vitally affected by the orders of the referee in this proceeding, reasonable notice and an opportunity to be heard are essential to the validity of such orders. Necessity for this reasonable notice and hearing is shown clearly on page 30 of the Transcript wherein it is shown that the personal affairs of the bankrupt were very simple, separate columns showing in the books of the trust estate being handled by the bankrupt, showing any amounts due at any time by the bankrupt for his personal account, a very short time being necessary to look this up

and determine what belonged to the clients of bankrupt and what belonged to him in the way of fees for handling clients' funds, it being shown on page 30 of the Transcript that the trustee called up the bank in which funds where kept in bankrupt's name as attorney, instructing bank not to pay out any such funds, whereby funds belonging to others, clients and beneficiaries of said bankrupt, were tied up for 73 days and much longer periods by reason of extensions of time for filing objections to discharge, it being shown on page 31 of the Transcript that beneficiaries of the trust were entitled to and in need of funds belonging to them, one of the beneficiaries and clients being for weeks at the point of death in a hospital in San Antonio and at home and urgently in need of funds by reason of her sickness and illness, it being shown that the attempt was made to tie up all of these funds belonging to others, the evident purpose being to try to get some compromise so that commissions could be collected, this void order thereby greatly injuring innocent people who were sick, when the books showed plainly that these funds belonged to them.

Notice and hearing also are required by general order in Bankruptcy 23, as follows: "In all orders made by a referee, it shall be recited accordingly as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests."

In the well known Rosser Case 101 F. 562; 4 Am. B. R. 153 (8th Cir. Ct. Appls. 1900)—a leading and oft quoted case—the following language is used:" IT IS CERTAIN THAT NOTICE TO THE PARTIES TO BE AFFECTED OF THE CLAIM AGAINST HIM, AND AN OPPORTUNITY TO BE HEARD UPON IT, ARE ESSENTIAL ELEMENTS OF EVERY PROCEEDING IN A COURT

OF JUSTICE WHICH CAN BE SAID TO CONSTITUTE DUE PROCESS OF LAW, OR TO BE IN ACCORD WITH THE LAW OF THE LAND * * *. IT MUST GIVE HIM NOTICE OF THE CHARGE OR CLAIM AGAINST HIM, AND AN OPPORTUNITY TO BE HEARD respecting the justice of the ORDER or JUDGMENT SOUGHT * * *. JUDICIAL ORDERS OR JUDGMENTS AFFECTING THE LIVES OR PROPERTIES OF CITIZENS IN THE ABSENCE OF SUCH NOTICE AND OPPORTUNITY to the parties affected are VIOLATIVE of the FUNDAMENTAL PRINCIPLES of our laws, and CAN NOT BE SUSTAINED * * *. It is a rule as old as the LAW, and NEVER MORE TO BE RESPECTED THAN NOW, that NO ONE SHALL BE PERSONALLY BOUND UNTIL HE HAS HAD HIS DAY IN COURT; by which is meant UNTIL HE HAS BEEN DULY CITED TO APPEAR, and has been AFFORDED AN OPPORTUNITY TO BE HEARD. Judgment without such citation and opportunity wants ALL THE ATTRIBUTES OF A JUDICIAL DETERMINATION; IT IS JUDICIAL USURPATION AND OPPRESSION, and NEVER CAN BE UPHELD where JUSTICE is JUSTLY ADMINISTERED * * *. No opportunity was presented to him to produce witnesses in his defense nor to be heard upon the issue of fact or of law which was the issue of the ORDER INVOLVED. Such a proceeding LACKS EVERY ELEMENT OF DUE PROCESS OF LAW * * *. IT CONSIDERS WITHOUT NOTICE, CONDEMNS WITHOUT HEARING, AND RENDERS JUDGMENT WITHOUT TRIAL. THE ORDER OF THE REFEREE WAS UNLAWFUL AND VOID."

SO SAY WE that in the case at bar "THE ORDER OF THE REFEREE WAS UNLAWFUL AND VOID."

CREDITORS NOT LEGALLY QUALIFIED TO MAKE THE MOTION FOR EXTENSION OF TIME WITHOUT FIRST REQUESTING THE TRUSTEE TO DO SO.

Collier on Bankruptcy, 14th Edition, Volume 2, page 280, states: "Where bankrupt has already been subject to an examination, he may be ordered to submit to a second examination, if in the discretion of the Court it seems necessary".

Ibid. Page 283. Since there is "no absolute right to examine anyone", an order for examination under paragraph 21-a is always discretionary; and the order for examination of a witness, whether on first or second examination, should be for a special cause shown."

The above statements of Collier and the authorities therein cited show that the order for examination of a witness, whether of first or second examination, should be for a special cause shown. There was no proof of any kind offered showing anything in support of the motion for extension of time for filing objections to bankruptcy discharge, upon which the alleged order of December 9, 1942 was based.

The further statement is there made: "It has been indicated that where a creditor desires examination of a witness, he should first apply to the * * * trustee and if refused, then apply to the court and show that the refusal was unwarranted."

Ibid. Paragraph 21.06. WHO MAY APPLY FOR A PARA. 21a EXAMINATION. "A CREDITOR DESIRING AN EXAMINATION SHOULD FIRST APPLY TO THE * * * TRUSTEE, IF ONE HAS BEEN APPOINTED, AND IF REFUSED, SHOULD THEN ASK THE COURT FOR AN ORDER DIRECTING THE OFFICER TO

UNDERTAKE THE EXAMINATION AND SHOW THAT HIS REFUSAL IS UNWARRANTED."

These creditors had no standing in court to ask for an extension, that being the right of the trustee. The creditors had taken no part in the examination, were not attending the bankruptcy court, and their effort by mail to obtain an extension undoubtedly made the alleged order absolutely void. If the extension could be made legally by creditors nearly 300 miles away not participating in the examination, the bars would be down so that these creditors could harass those who were sick and in need of funds by tying up these funds indefinitely, although the books clearly showed they did not belong to the bankrupt. It would be contrary to the fundamentals of justice and unthinkable in judicial proceedings for any such pretended order to have any validity.

The attempt will probably be made to justify the alleged order under Rule 6 of the Rules of Civil Procedure for the District Court of the United States: Time. (b) Enlargement. "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the Court for CAUSE SHOWN may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period orignially prescribed or as extended by previous order, etc." These rules do not apply to bankruptcy matters except by special general order in bankruptcy promulgated by United States Supreme Court, Bankrupt Order 37, providing that under proceedings under the Bankruptcy Act, the Rules of Civil Procedure for the District Courts of the United States shall in so far as they were not inconsistent with the Act, or with these General Orders, be followed as nearly as may be, etc. The above rule would

have to be given a constitutional construction, and enlargement without notice could apply only to matters that are of right and not those of discretion. The above rule also clearly provides that the enlargement must be FOR CAUSE SHOWN, which means reasonable notice and opportunity to be heard and evidence; otherwise, there would be NO CAUSE SHOWN. In addition to this, there is a special provision in the Bankruptcy Act about the extension of time for filing objections for discharge. This provision would apply and not Rule 6, since such rules are expressly to be disregarded if inconsistent with the Act, the applicable provision of the Bankruptcy Act being as follows: Act of 1938. Sec. 14(b): "After the bankrupt shall have been examined, either at the first meeting of creditors or at a meeting specially fixed for that purpose, concerning his acts, conduct and property, the court shall make an order fixing the time for the filing of objections to the bankrupt's discharge, notice of which order shall be given to all parties in interest as provided in Section 58 of this Act. Upon the expiration of the time fixed in such order or of the extension of any such time GRANTED BY THE COURT, the Court shall discharge the bankrupt if no objections have been filed * * *. The words "granted by the court", and the words of rule 6 above, "for cause shown", both mean notice, hearing, evidence, because the plainest and clearest of constitutional principles, and the practices among English speaking peoples for so long a time require such.

In Sec. 14, paragraph (b), Act of 1938, the word "granted" means reasonable notice, hearing, argument if desired, and in a public hearing; "by the Court", showing that it must be a judicial act, the act of a real court, carrying on its proceedings openly—not in secret—the right to argue the matter if desired and based on evidence, the

arbitrary power to sign suc[h] alleged orders and have them
upheld as valid would mea[n] the establishment of a bank-
ruptcy ring as bad as any[thing] ever known in any bankruptcy
court without even the rudi[ments] of English law and justice
recognized, and with unlin[ited] opportunities to wear out
anyone whose properties [happened] to be handled as at-
torney by a bankrupt.

THESE CREDITORS ALS[O] HAD NO RIGHT TO MAKE THE MOTION BY M[AIL] WHERE THEY WERE NOT PARTICIPATI[NG] IN THE PROCEEDINGS BECAUSE THEIR N[ON-PARTICIPATION] SHOWED CONCLUSIVELY [THAT] THEY WERE GUILTY OF LACHES.

Three men in Dallas, [Texas,] without being known to those whose property they [ought] to confiscate, not daring to confront those whom [they] sought to despoil—women dependent on others for adv[ice,] counsel and supervision over that which belonged to t[hem]—one at death's door with funds needed to buy med[icine]—all these things, if the validity of the pretended or[der] be upheld would result in the confiscation of the proper[ty] belonging to others through endless socalled examinati[ons,] the referee and trustee receiving practically all thei[r] compensation as commissions from assets that come in[to] the bankruptcy, examination being continued at the ille[gal] request of three creditors in Dallas not qualified legal[ly] to make any motion in the matter because they seek to usurp the authority of the trustee, and because they [have] been guilty of laches in not participating in the examin[ation] at all.

THE PRETENDED ORDER OF DECEMBER 9, 1942 IS ABSOLUTELY VOID FOR ANY ONE OF THE FOLLOWING SEVEN REASONS:

1. Dallas creditors not legally qualified to make the motion for extension of time without first requesting the trustee to do so.

2. Such creditors disqualified to make the motion because not participating in the examination, thereby having been guilty of laches.

3. No notice.

4. No hearing—not even by makers of motion.

5. No evidence—not even an affidavit.

6. No argument, or chance to present the facts and the law by anybody.

7. Signing and whole proceeding in secret like Court of Star Chamber, thereby not being judicial proceedings at all, and pretended order absolutely void.

The 73 days originally given by the referee by announcement in open court at the first creditors' meeting, which was also put in the form of an order, gave more than enough time to examine the columns in the books to see whether at the time the petition was filed, any of the funds shown by these trust fund books, afterwards funds held as attorney, belonged to the bankrupt at the time the petition was filed, the whole purpose of the long drawn out examination and extensions of time were for the purpose of attempting in some way for the creditors, the trustee and his attorney, to get at these funds belonging to others, one at death's door, so that commissions might be collected.

We are all familiar with the decision of the United States Supreme Court in the case of Tumey vs. State of Ohio, 71 L. Ed. 749, March 7, 1927, where the mayor of an Ohio town was acting as judge in a criminal case, no fees

or costs being paid to the judge except by the defendant being convicted. Chief Justice Taft, writing for the United States Supreme Court, said, "There is therefore no way by which the mayor may be paid for his services as judge, if he does not convict those who are brought before him. Officers acting in judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule * * *. No matter what the evidence was against him, he had the right to have an impartial judge".

Counsel for Appellee may quote the cases shown on page 15 of the Transcript cited as authority for the rule that the interest of the referee in commission he may receive from on estate does not disqualify him to act as such: Re: Strobel, 160 F. 916, Lower Court Decision. Re: Abbey Press, 134 F. 51, Cert. Den., 196 U. S. 42; 49 L. Ed. 631; 25 S. Ct. 797. The Tumey case is later than either of these cases, and evidently overrules them.

The record shows that the referee signed the pretended order of December 9, 1942 in secret without judicial proceedings; it also shows the soundness of the decision of the highest federal court in the Tumey case, the opinion being written by a great Chief Justice.

Collier on Bankruptcy, 14th Edition, Volume 2, page 281, uses the following language: "* * * and, if a creditor has been afforded a full opportunity for an examination, of which he did not avail himself, his application will be denied." (Quoting authorities). It will thus be seen that where a creditor has been afforded a full opportunity to participate in the examination and has not availed himself of the opportunity, his application will be denied.

16 C. J. S. 1141 et seq. Article, CONSTITUTIONAL LAW, subhead DUE PROCESS OF LAW, states that in the concrete due process of law means that in a contest involving substantive rights, the litigant will be afforded the

opportunity to contest the propriety of each step in the action sought to be taken against him. (Citing cases).

In 37 Am. Jur. 15, "It has been held that it is clearly within the province of the Court to set aside an improper ex parte order as soon as the Court's attention is called to its character". (Citing cases).

Since ample time has been given to file objections to discharge, and none have been filed, and no valid order has ever been entered extending the time, this Court upon appeal should by opinion and mandate require the vacating of this void order of December 9, 1942, and direct the discharge of the bankrupt.

Respectfully submitted,

ALBERT COVINGTON DULANEY,

Albert Covington Dulaney Appellant.